Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

LAWRENCE TYLER,
Petitioner,

v.

JAMES H. DOUGLAS, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the Second Circuit United States Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a court purporting to apply the "plain meaning" rule of statutory construction properly give effect to the will of Congress when its construction:

(a) assumes "clear and unambiguous" language where other courts have discerned ambiguity;

(b) partially repeals a statute by implication—thus destroying the valuable vested statutory rights of millions of Americans—where there is no reference in the text or legislative history of the latter enactment to the statute purportedly repealed, the rights embodied therein, or its former beneficiaries;

(c) rejects a plain interpretation that gives effect to both the earlier and later statutes, thus ignoring the cardinal obligation to harmonize statutes whenever possible;

(d) ignores the statutory context that confirms a more plausible legislative intent;

(e) renders all but the last sentence of the latter enactment superfluous;

(f) finds an implied repeal in an emergency appropriations rider—even though both houses of Congress forbid such substantive change of law in appropriations measures; and

(g) effects a massive taking of property without just compensation, though Congress never contemplated such a result, which raises serious constitutional problems that can easily be avoided with a harmonizing interpretation?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner Lawrence Tyler, on behalf of himself and all others similarly situated, and the following respondents:

1. Defendant James H. Douglas, in his official capacity as escrow agent on behalf of the State of Vermont.

2. Defendant William H. Sorrell, in his official capacity as Attorney General of Vermont.

3. Defendant Eileen Elliot, in her official capacity as Commissioner, Vermont Department of Social Welfare.

4. Defendant Lori Collins, in her official capacity as Third Party Liability Supervisor, Vermont Department of Social Welfare.

5. The States of Nevada, Alabama, Alaska, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maryland, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah and West Virginia filed an *amici curiae* brief in the Second Circuit in support of Respondents.

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OPINIONS BELOW

The unreported decision of the United States District Court for the District of Vermont and the opinion of the Second Circuit United States Court of Appeals, reported at 280 F.3d 116 (2nd Cir. 2001), are set forth in the Appendix at App. 18a and App. 4a, respectively.

BASIS FOR JURISDICTION

The opinion of the Second Circuit United States Court of Appeals was filed on October 16, 2001. The order of the Second Circuit denying the Petition for Rehearing was filed on December 27, 2001. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the United States Constitution Amendments V and XIV appear in the Appendix at App. 43a. In addition, the relevant portions of the Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, 113 Stat. 57 (1999) (codified at 42 U.S.C. § 1396b(d)(3)) and of 42 U.S.C. § 1396k appear at App. 48a and 45a, respectively.

STATEMENT OF THE CASE

This case derives from the lawsuits by the fifty states against tobacco companies to recoup the states' Medicaid expenditures. These historic lawsuits ultimately led to an unprecedented settlement in which states stand to collect billions of dollars in perpetuity.

Federal Medicaid law provides that upon actual collection of any Medicaid recovery—for example, upon each future annual payment from tobacco companies—the state and federal governments are fully made whole for their Medicaid expenditures. The balance of the recovery, if any, goes to individual Medicaid recipients such as Petitioner here. 42 U.S.C. § 1396k(b).

This lawsuit is that simple. Yet is has spawned a bizarre jurisprudence. In the several states where Medicaid recipients have sued to enforce supreme federal Medicaid law (including Vermont, the origin of this lawsuit), nearly all courts have decided that Medicaid recipients lose, but their multiple paths to that result often contradict each other and this Court's authoritative direction. While district courts have nearly all dismissed these Medicaid enforcement cases on Eleventh Amendment sovereign immunity grounds, not a single one of the six federal courts of appeal to decide a Medicaid case has agreed. Two circuits expressly disagreed, holding correctly that the Eleventh Amendment did not bar this suit for prospective enforcement of supreme federal law. The other four circuits elected to bypass the Eleventh Amendment question and affirmed on different grounds.

Three federal courts of appeal—the First, Second, and Tenth Circuits—decided the case based upon an emergency appropriations rider enacted in 1999, in which Congress waived the federal share of the states' historic Medicaid recovery. *See* Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, 113 Stat. 57, 103-04 (1999), codified at 42 U.S.C. § 1396b(d)(3) (App. at 48a). These courts inflated that express waiver of the *federal* share into an implied repeal of *Medicaid recipients'* statutory entitlement to the remainder under 42 U.S.C. § 1396k(b).

This Petition seeks review of this remarkable departure from established canons of statutory construction.

A. The Medicaid Program

"The Medicaid program provides federal funds to States that pay for medical treatment for the poor." *Schweiker v. Gray Panthers*, 453 U.S. 34, 36 (1981). It is "a cooperative federal-state program through which the Federal Government provides financial assistance to the states so that

they may furnish medical care to needy individuals." *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 502 (1990).

"Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX [the Medicaid Act]." *Harris v. McRae*, 448 U.S. 297, 301 (1980); *see also Wilder*, 496 U.S. at 501. Vermont has chosen to participate in the Medicaid program, and by statute commits to administration of its Medicaid program as "required ... under Title XIX of the Social Security Act." 33 V.S.A. § 1901.

Among the provisions of the Medicaid Act, to which Vermont expressly subscribed in exchange for hundreds of millions of dollars of federal assistance, is mandatory recovery, where practicable, of Medicaid expenditures for which third parties are responsible. 42 U.S.C. § 1396a(a)(25). Such a recovery must then be distributed in the following order: (1) to the state, for its Medicaid expenditures; (2) to the federal government, for its contributed expenditures; and (3) to the injured Medicaid recipients on whose behalf the expenditures were made. 42 U.S.C. § 1396k(b) (App. at 46a); *see also* 42 C.F.R. § 433.154 (same); 45 Fed. Reg. 8983 (1980) (HCFA's official commentary). This distribution requirement ensures that both the state and federal government are made whole, with the balance of a recovery, if any, going to the injured party.

B. Vermont's Medicaid Recovery: The Tobacco Settlement

This case arises following Vermont's resolution of its lawsuit against manufacturers of tobacco products, brought in July 1998 by the State of Vermont against the tobacco industry. Prominent in Vermont's lawsuit, as with the tobacco lawsuits of all states, were claims of Medicaid expenditures caused by tobacco products.

The case settled on March 25, 1999 pursuant to a Consent Decree and Final Judgment. Vermont then became eligible to participate in a Master Settlement Agreement ("MSA") crafted by the tobacco industry and the Attorneys General of 46 settling states. In the MSA, the states agreed to "unconditionally release and forever discharge" the tobacco defendants from "any future claims for reimbursement of health care costs allegedly associated with the use of or exposure to Tobacco Products." MSA at 8, 55. In exchange for this release, the states, including Vermont, became eligible to collect from the tobacco defendants future anticipated annual payments in a total amount then estimated at $206 billion. The complaint in this case pleads, and the evidence submitted to the district court confirms, that Vermont's settlement collections will substantially exceed its actual smoking-related Medicaid expenditures, and that Petitioner and others similarly situated are entitled to those excess collections under governing federal law.

Significantly, before these Medicaid enforcement lawsuits, there was no material controversy over the straightforward proposition that the tobacco settlement constituted a Medicaid recovery. Indeed, until the pot got massive, states themselves behaved in conformity to § 1396k(b)'s mandatory distribution scheme. In testimony before Congress, the Deputy Administrator of the Health Care Financing Administration ("HCFA," the federal agency then responsible for administering the Medicaid program), stated:

> Existing Federal law clearly requires States to share all Medicaid recoveries with Federal taxpayers. **Nothing in the law creates an exception for tobacco settlements, regardless of their size.** States routinely report and credit HCFA with the Federal share of third party liability collections. It is worth highlighting that three States—Massachusetts,

> Louisiana, and Florida—reported and credited to HCFA some of their tobacco collections as part of a settlement with the Liggett Corporation. Although the funds involved in the Liggett settlement are much smaller than those at stake in the comprehensive settlement, these initial payments indicate that **the States understand their legal and fiduciary responsibility to credit the Federal government with its share of tobacco settlement proceeds.**

Medicaid and Tobacco Settlements, 1999: Before Subcommittee on Labor, HHS, Education, and Related Agencies of the Senate Comm. on Appropriations, March 15, 1999, (Statement of Mike Hash, Deputy Administrator, Health Care Financing Administration) (emphasis added).

C. This Lawsuit for Prospective Enforcement of 42 U.S.C. § 1396k(b).

Petitioner Lawrence Tyler filed suit on behalf of himself and all others similarly situated in the United States District Court for the District of Vermont on January 26, 2000. Defendants Douglas, Sorrell, Elliot and Collins filed a motion to dismiss under Rule 12(b)(1) on April 10, 2000, claiming that Eleventh Amendment sovereign immunity barred Petitioner's claims. The trial court agreed and granted the motion to dismiss by order dated June 21, 2000.

On October 16, 2001, the Second Circuit affirmed. Tyler filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on November 1, 2001, which the Second Circuit denied by order dated December 27, 2001.

The Second Circuit panel, however, elected to bypass the Eleventh Amendment question. The panel instead decided that Congress' 1999 emergency appropriations rider (App. at 48a)—an amendment to a separate section of the Medicaid Act concerning only calculation of money due the federal

government—implicitly repealed § 1396k(b) and thus *sub silentio* stripped Medicaid recipients of substantial vested rights. Neither the text of the 1999 appropriations rider nor its legislative history makes any reference to § 1396k(b) or to the rights of Medicaid recipients embodied therein.

REASONS FOR GRANTING THE WRIT

This case frames a pure issue of statutory construction with implications for how every judge in every district and appellate court interprets legislation. Petitioner respectfully contends that the error in the Second, Tenth, and First Circuits bespeaks a fundamental misunderstanding of the weight and interrelation of core canons of statutory construction.

The Second Circuit concluded that the final sentence of Congress' 1999 appropriations rider—permitting the states to "use the sums described in clause (i) for any expenditures determined appropriate by the State"—means that the states could spend the *entire* tobacco settlement in any manner they pleased, and that Congress thus not only gifted billions of *federal* dollars to the states but likewise by stealth stripped Medicaid recipients of their vested statutory rights.

Yet the text of the appropriations rider does not say that. Nor could its *context* cue any conclusion other than the opposite one. And the rider's legislative history confirms the error. The members of Congress debated only what to do with the *federal* share of the states' Medicaid recovery. The members of Congress then located their enactment in a section of the Medicaid Act addressing only money to which the *federal government* would have been entitled. And they did so with an emergency appropriations rider—the kind of enactment *least* suited to affect substantive change in law (which is why rules in both houses of Congress forbid it). Never once did any member of Congress ever mention or

even imply any intention to affect Medicaid recipients' rights.

At stake here is not only a massive confiscation of property from the nation's poorest citizens,[1] or merely a mistaken interpretation of a single statute—but the basis upon which the judiciary lays claim to principled and consistent decision-making. The danger in the circuit decisions is an unprecedented departure from the rules that discipline judges in "giving effect to the will of the Legislature." *Osborn v. Bank of the United States*, 22 U.S. (Wheat.) 738, 866 (1824). The published opinions to date—and more Medicaid enforcement cases are currently under consideration—imperil the utility and integrity of the canons of construction. On this record, the core canons of statutory construction have little power to cabin judicial discretion.

Indeed, to the eight well-settled canons of statutory construction set forth in the following Supreme Court cases, the Second Circuit decision below, as well as the decisions from the First and Tenth Circuits, essentially add, "**or not**."

- "[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotations omitted). The two statutory provisions at issue are clearly capable of co-existence—in § 1396k(b), Congress mandated a specific distribution scheme for Medicaid recoveries; in the 1999 appropriations rider, Congress declared that the states

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[1] Medicaid, as "the payor of last resort," requires citizens to spend down their assets to meet eligibility levels. *See* 42 U.S.C. 1396a(a); S.Rep. No. 99-146 at 312, reprinted in 1986 U.S.Code Cong. & Ad.News, vol. 3A, 279 ("Medicaid is intended to be the payor of last resort, that is, other available resources must be used before Medicaid pays.").

were free to use *the federal share* of the tobacco settlement however they wish.

- **"[T]he meaning of statutory language, plain or not, depends on context."** *Bailey v. United States*, 516 U.S. 137, 145 (1995). The statutory context of the 1999 amendment confirms Congress' intent only to waive the federal share of the tobacco settlement, not to affect Medicaid recipients' rights.

- **"[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change."** *United States v. Fausto*, 484 U.S. 439, 453 (1988). Neither the text nor legislative history of the 1999 appropriations rider even hints at any intention to affect § 1396k(b) or the rights of Medicaid recipients.

- **"[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest."** *Rodriguez v. United States*, 480 U.S. 522, 524 (1987); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (implied repeals would require "positive repugnancy between the provisions"); *Morton v. Mancari*, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."). Congress did not even hint at intent to repeal § 1396k(b), much less make it clear and manifest or enact a "positive repugnancy."

- **"It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"** *TRW Inc. v. Andrews*, 534 U.S. 19, —,

122 S.Ct. 441, 449 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). The decision below renders superfluous all of the 1999 amendment except the final sentence.

- **The doctrine disfavoring repeals by implication applies "with even *greater* force when the claimed repeal rests solely on an Appropriations Act."** *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). The 1999 amendment was an emergency appropriations rider—a legislative vehicle that, by rules in both houses of Congress, cannot affect substantive change in law.

- **"Accordingly, the first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively."** *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001) (citing *Martin v. Hadix*, 527 U.S. 343 (1999)). The circuit court's interpretation operates retroactively to strip Medicaid recipients of substantial vested rights, though Congress never hinted at any intention to affect Medicaid recipients *at all*, much less directed such a confiscation with "the requisite clarity."

- **Statutes must be interpreted to avoid not merely unconstitutional results, but "difficult constitutional questions," and where, "an alternative interpretation of the statute" that avoids any constitutional thicket is "fairly possible," courts "are obligated to construe the statute to avoid such problems."** *St. Cyr*, 533 U.S. at 300 & n.13. According to the circuit court's interpretation, Congress retroactively confiscated Medicaid recipients' statutorily vested property interest in the tobacco settlement remainder—which assuredly raises a "difficult constitutional question," despite a

logical and persuasive interpretation that avoids constitutional difficulty.

The "plain meaning" doctrine is a powerful force that disciplines judiciary and legislature alike—but like all rules of statutory construction, its power must be exercised responsibly and always in the service of discerning actual legislative intent. This Court's unanimous disposition yesterday in *Department of Housing and Urban Development v. Rucker*, No. 001770, 001781 (March 26, 2002)—reversing the en banc Ninth Circuit—is illustrative. The en banc Ninth Circuit contrived an inventory of improper canons to subvert plain statutory meaning and clear congressional intent. Here, the Second Circuit ignored numerous well-settled canons of construction to find plain meaning where there is none, and to subvert clear congressional intent. There is manifest error in either approach.

This case provides an ideal complement to the principles forcefully enunciated in *Rucker*. Where *Rucker* illustrates the proper use of the plain meaning doctrine, this case illustrates its misuse.

If, as Petitioner respectfully contends, the Tenth, Second, and First Circuits erred, then the very magnitude of that error, in a case affecting millions of Americans immediately, and countless more in future judicial dispositions, warrants this Court's intervention to correct it. If, as Respondents will contend, the circuit decisions are correct in result, then this Court's explanation of a principled basis for that result can have enormous consequences for how judges and litigants comprehend the tools of statutory construction.

ARGUMENT

I. The Current Medicaid Enforcement Landscape

Numerous district courts and six federal courts of appeal, including the Second Circuit, have decided similar cases on a variety of often contradictory grounds. Decisions to date are nearly all adverse to Medicaid recipients—yet that "momentum" is so fragmented and so fraught with conflict and disagreement that the ease with which most courts have apparently decided the result very much belies the struggle to find a principled basis for that result.

The first—and perhaps most influential—Medicaid enforcement disposition in federal court was *Floyd v. Thompson*, 111 F.Supp.2d 1097 (W.D. Wis. 1999), *aff'd on other grounds*, 227 F.3d 1027 (7th Cir. 2000). The court dismissed the case by declaring that the tobacco settlement proceeds were "fixed" and had already "vested" in the state, rendering the case one for retrospective "damages" and thus barred by the Eleventh Amendment—a conclusion both factually wrong and legally irrelevant to the proper *Ex parte Young* analysis.

While six United States Courts of Appeals have now issued decisions on versions of these Medicaid enforcement actions, not a single one embraced the Wisconsin court's conclusion (including the Seventh Circuit on appeal), and the Tenth Circuit expressly repudiated it. Indeed, not a single federal appellate court has yet held that the Eleventh Amendment bars a Medicaid enforcement action—and two (the Fifth and Tenth Circuits) have correctly held that it does not. But the Wisconsin court's analytical virus spread rapidly through other district courts, and at least **eleven** such courts

reproduced the Wisconsin court's fallacious reasoning in dismissing these cases on Eleventh Amendment grounds.[2]

The first federal appellate court to decide a Medicaid case was the Seventh Circuit in *Floyd v. Thompson*, 227 F.3d 1029 (7th Cir. 2000). Concluding that the Eleventh Amendment questions were "complex" and "not easily answered," *id.* at 1034-35, the Seventh Circuit skipped them and proceeded to the merits. As to Congress' 1999 appropriations rider—now the most common basis for adverse decisions in appellate courts and the basis for this Petition—the Seventh Circuit simply discerned ambiguity: maybe Congress agreed with the states or maybe Congress was just "feeling generous." *Id.* at 1034.

Thus, the Seventh Circuit acknowledged ambiguity in precisely the words that the Second Circuit below deemed "plain" and "clear and unambiguous," App. at 14a—which is to say that the very word "unambiguous" now assumes an ironic ambiguity. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (questioning characterization of a statutory term as unambiguous when its meaning has generated a division of opinion in the lower courts).

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[2] *See Barton v. Summers*, 111 F.Supp.2d 989, 992 (M.D.Tenn. 2000); *White v. Hunt*, 2000 WL 33261006, *5, No. 00-CV-14 (W.D.N.C. Jul. 12, 2000); *McClendon v. Georgia Dep't of Community Health*, No. 4:00-CV-0026-HLM, slip op. at 17 (N.D.Ga. Aug. 28, 2000); *Downs v. Kentucky*, No. 00-23, slip op. at 7 (E.D.Ky. Aug. 31, 2000); *Martin v. New Mexico*, 197 F.R.D. 694, 696 (D.N.M. 2000); *Strawser v. Lawton*, 126 F.Supp.2d 994, 1003 n.6 (S.D.W.Va. 2001); *Cardenas v. Anzai*, 128 F.Supp.2d 704, 709 (D.Haw. 2001); *Greenless v. Almond*, No. 00-037ML, slip op. at 6 (D.R.I. Feb. 26, 2001); *Rickerts v. Guinn*, No. CV-N-00-0176-HDM, slip op. at 4 (D.Nev. Feb. 27, 2001); *Clark v. Stovall*, 158 F.Supp.2d 1215, 1224 (D.Kan. 2001); *Joseph v. Condon*, No. 6:00-324-24, slip op. at 11 (D.S.C. Mar. 19, 2001).

On narrow grounds of Wisconsin assignment law, the Seventh Circuit held that § 1396k(b) did not come into play because there was not (and, logically extending this holding, never could or ever will be under any circumstances) a "remainder" to which Medicaid recipients could be entitled. If, as the Seventh Circuit found, the "assignment [to the state by Medicaid recipients] corresponds exactly to the amounts the state pays," *id.* at 1037, then 42 U.S.C. § 1396k(b) is a nullity, never triggered, and so much statutory surplusage—because any conceivable remainder has been defined out of existence by the artifice of declaring that the state collects "under an assignment" exactly what it spends.

The Fifth Circuit then decided *Watson v. State of Texas*, 261 F.3d 436 (5th Cir. 2001), a Medicaid enforcement action with a somewhat different procedural posture. Confronting the Eleventh Amendment head on—but not addressing *Ex parte Young*—the Fifth Circuit concluded simply that the State of Texas had waived its sovereign immunity in the Master Settlement Agreement as to matters of enforcing that Agreement, and that the instant case was such a case of enforcement.

As to Congress' 1999 appropriations rider, the Fifth Circuit held exactly as the entire text, its context and legislative history compel: "The Federal Government has waived any claim it may have to reimbursements." *Id.* at 443 (citing 42 U.S.C. § 1396b(d)(3)(B)(i)). Nothing more, nothing less. The Second Circuit's "clear and unambiguous" *opposite* meaning had yet to become plain.

The Fifth Circuit then proceeded to its version of the merits, and concluded that Texas proceeded "directly" against tobacco companies, rather than through subrogation or assignment, and that the absence of state claims "under an assignment" accordingly failed to trigger § 1396k(b). *Id.* at 444. Thus, while the Seventh Circuit's disposition

essentially reads § 1396k(b) out of the statute books, the Fifth Circuit's disposition permits a state to accomplish that remarkable result at its pleading discretion (*viz.*, by proceeding "directly" against a third-party tortfeasor, rather than "under an assignment").

Ten days after the Fifth Circuit's disposition, the Eleventh Circuit decided *McClendon v. Georgia Dept. of Community Health*, 261 F.3d 1252 (11th Cir. 2001). Doubling back to the Seventh Circuit's approach, and likewise finding the *Ex parte Young* issues "much thornier," *id.* at 1259, the Eleventh Circuit skipped to the merits, and concluded that Georgia only collected under the statutory assignment "what it actually spent on medical assistance." *Id.* at 1261. Again, the deceptively elegant appearance of this disposition (assignment equals collection) belies what is in fact a complete evisceration of § 1396k(b)—or that portion of it that benefits Medicaid recipients. In the Seventh and Eleventh Circuits, the phrase, "and the remainder of such amount collected shall be paid to such individual," has disappeared from the United States Code, there no longer being any possibility of such a "remainder."

The Tenth Circuit weighed in next with yet a fourth approach to the issues. In *Harris v. Owens*, 264 F.3d 1282 (10th Cir. 2001), the court first concluded that it was obliged to resolve the Eleventh Amendment issue. "Once effectively raised, the Eleventh Amendment becomes a limitation on our subject-matter jurisdiction, and we may not then assume 'hypothetical jurisdiction' to reject a plaintiff's claim on the merits." *Id.* at 1288.

Thereupon, the Tenth Circuit finally addressed and authoritatively dispatched the mischief wrought by the Wisconsin district court in *Floyd*. "From a purely economic perspective, it may be irrelevant that the settlement funds are to be paid over time rather than all at once; the future amount

can be reduced to present value. For the purposes of the Eleventh Amendment, however, the difference is highly relevant." *Id.* at 1291-92. Concluding that the state's decision to keep the entire tobacco windfall "may constitute an ongoing violation of federal law," and that the plaintiff sought only "prospective" relief with respect to future collections, the Tenth Circuit concluded that *Ex parte Young* operated to avoid the Eleventh Amendment bar. The court only then turned to the merits. For multiple reasons discussed hereunder, the Tenth Circuit erred in concluding that Congress' 1999 appropriations rider *sub silentio* stripped Medicaid recipients of their vested statutory rights under § 1396k(b).

A month later, the Second Circuit decided *Tyler v. Douglas*, 280 F.3d 116 (2nd Cir. 2001). And on January 28, 2002, the First Circuit decided *Greenless v. Almond*, 277 F.3d 601 (1st Cir. 2002). Those Courts skipped the Eleventh Amendment question, and proceeded directly to Congress' 1999 amendment. Whereas the Seventh Circuit simply saw ambiguity and the Fifth Circuit simply saw a federal waiver, the First and Second Circuits found "clear and unambiguous" evidence that Congress had quietly and retroactively stripped millions of Medicaid recipients of their vested statutory rights under section 1396k(b). App. 10a-17a.

The district and circuit courts require guidance.

II. Congress' 1999 Emergency Appropriations Rider Does Not Even Reference, Much Less Repeal, Section 1396k(b) or the Vested Rights Embodied Therein.

After intense lobbying by the States to prevent the federal government from claiming its share of the tobacco settlement as a Medicaid recovery, Congress included a rider to the Emergency Supplemental Appropriations Act of 1999 providing that HCFA would not treat tobacco settlement

funds as an overpayment to the States for the purpose of offsetting future federal Medicaid matching funds. In other words, the federal government waived its claim to its share of the tobacco settlement.

The 1999 Amendment to 42 U.S.C. § 1396b(d)(3) provides as follows:

> (A) The pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision therefor with respect to medical assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection.
>
> (B)(i) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of Title 26 [26 U.S.C.A. § 5702(d)], and State Attorneys General, or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.
>
> (ii) Except as provided in subsection (i)(19), a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

42 U.S.C. § 1396b(d)(3).

The Tenth, Second, and First Circuits have now concluded—based solely upon the last sentence of the appropriations rider—that rather than simply waiving the federal government's rights to its share of the tobacco settlement, which is all Congress ever debated, the rider somehow

lurched into distant sections of federal Medicaid law, *sub silentio* repealed § 1396k(b)—a section of the Medicaid Act **50 pages away** in the United States Code—and retroactively stripped Medicaid recipients of substantial vested rights without ever mentioning § 1396k(b) or Medicaid recipients. Such an interpretation bears neither logical nor constitutional scrutiny.

A. The Text and Context of the 1999 Appropriations Rider Demonstrate Plainly That Congress Waived Only the Federal Government's Share of the Tobacco Settlement.

Congress expressly understood the tobacco settlement to be a Medicaid recovery, subject to supreme federal Medicaid law—and then chose to treat the tobacco settlement proceeds in the section of federal Medicaid law dealing with how the federal government calculates annual Medicaid payments it will make to states. The straightforward text and context of the 1999 appropriations rider confirms that it concerns *only* the portion of the tobacco settlement to which the federal government would have been entitled.

Subsection **(A)** expressly refers to the "share to which the United States is equitably entitled." Subsection **(B)(i)** of the 1999 appropriations rider then says simply that this federal "share" shall not apply to the tobacco settlement. Subsection **(B)(ii)** then says that States may "use the sums described in clause (i) [*i.e.*, the federal share of the tobacco settlement] for any expenditures determined appropriate by the State."

The foregoing context and structure is significant. Congress targeted one, and only one section of federal Medicaid law—the section previously enumerated 1396b(d)(3), which it renumbered 1396b(d)(3)**(A)** in 1999, and to which it added

subsection **B** to address only the "share to which the United States is equitably entitled." *See* 42 U.S.C. § 1396b(d)(3).[3]

Conspicuous as well is what Congress did *not* do—amend or repeal or even mention § 1396k(b)—which it easily could have done and would have been obliged to do if it intended such a radical divestiture of statutory property rights. Though "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change," *United States v. Fausto*, 484 U.S. 439, 453 (1988), the 1999 appropriations rider never mentions section 1396k(b), never mentions Medicaid recipients, and never mentions any intent to repeal or affect any other portion of federal Medicaid law.

The title of the appropriations rider[4] reinforces the specific and limited scope of Congress' concern: "PROHIBITION ON TREATING ANY FUNDS RECOVERED FROM TOBACCO COMPANIES AS AN **OVERPAYMENT** FOR THE PURPOSES OF MEDICAID." *See Conference Report on 1999 Emergency Supplemental Appropriations Act*, 145 Cong. Rec. H3175, 3200 (emphasis added). The technical term "overpayment" applies specifically and exclusively to

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[3] By definition, of course, and as discussed in greater detail *infra*, appropriations measures concern *only* money going into or coming out of the federal government. They do not, and generally *cannot*, affect substantive statutory provisions, much less effect a massive confiscation of property belonging to private citizens.

[4] While not a dispositive feature of statutory construction, the title of an enactment may certainly point the way—especially where, as here, the title specifically signals the scope of the enactment, and no other textual evidence points *specifically* to a different or larger scope. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("We also note that 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.") (quoting *Trainmen v. Baltimore & Ohio RR. Co.*, 331 U.S. 519, 528-529 (1947)).

funds to which the federal government would otherwise be entitled.[5]

The Second Circuit construed the 1999 appropriations rider to strip Medicaid recipients of their rights under § 1396k(b) by concluding that it would decline to consider any other evidence of congressional intent—context, legislative history, primary canons of construction, constitutionality, contrary rules in both houses of Congress, and common sense—because the last sentence was allegedly "plain" in stripping Medicaid recipients of their rights. App. at 15a.

The Second Circuit effectively treated the last sentence of the appropriations rider as an independent statute, divorced from context and legislative history. Yet this Court has repeatedly emphasized that **text**—even assertedly "unambiguous" text—depends upon **context**. *See Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning" of statutory text—"but also its placement and purpose in the statutory scheme."); *accord FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

Moreover, the Second Circuit's treatment of subsection (B)(ii) as an independent repeal of substantive Medicaid law renders the 1999 appropriations rider bizarre. If Congress had truly intended to say that states were free to spend all of the tobacco settlement proceeds in whatever manner they pleased, notwithstanding the § 1396k(b) distribution rules or any other provision of federal law, then Congress could have enacted a statute that simply **said that**. Congress need never have concerned itself with the technical subject of "overpayments." If states can spend all of the money

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[5] This meaning of the term "overpayment" is expressly set forth in the statute itself, at § 1396b(d)(3)(A), which existed before the 1999 Amendment and was merely renumbered to add "(A)."

however they please, then *a fortiori* none of the tobacco settlement proceeds constitute "overpayments" or are otherwise subject to any federal equitable entitlement. In other words, the Second Circuit interpretation renders superfluous every word in the 1999 appropriations rider except for clause (B)(ii). There would have been no need for clause (B)(i) if indeed Congress intended to liberate the states to spend all of the tobacco settlement proceeds however they please, notwithstanding any contrary provision of federal law.

This Court recently reiterated the critical canon of statutory construction that forbids exactly what the Second Circuit (as well as the Tenth and First Circuits) did. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, —, 122 S.Ct. 441, 449 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

The question then naturally arises: why did Congress include language in subsection(B)(ii) that appears to free the states from constraint in spending tobacco settlement proceeds (or more precisely, the federal share of the tobacco settlement proceeds)? The answer, as the next section makes abundantly clear, is that the debate in Congress at the time of the 1999 enactment was on whether to give **the federal share** to the states without conditioning its use, or whether to give **the federal share** to states **with the stipulation that they must spend some or all of the federal share on specified health programs**. Those favoring conditions on the federal share lost. The rider ultimately enacted made clear that the federal government would not dictate how states must spend **the federal share**, despite the federal

government's "equitable entitlement" to a substantial part of the tobacco settlement.

B. The Legislative History of the 1999 Appropriations Rider Unambiguously Confirms That Congress Addressed Only the Federal Share of the Tobacco Settlement.

The Senators debating the federal treatment of the tobacco settlement divided roughly into two camps: one that wanted to let the states keep the federal government share and spend it however they wish; and another that wanted to let the states keep the federal government share, but make them spend it (or a portion of it) on salutary health programs.

Typical of the camp opposing the rider that was ultimately enacted, and instead favoring conditions on spending the federal share of the tobacco settlement, was this statement by Senator Kennedy:

> States are free to use **the state share** of their recoveries in any way they choose. However, Congress has a clear and compelling interest in how **the federal share** will be used.

145 Cong. Rec. S2889-S2890 (March 18, 1999) (statement of Sen. Kennedy). Congress' focus *only* on **the federal share**—and the debate over whether the federal government would dictate how the States must spend **the federal share**—could hardly be more plain.

Senator Harkin, who sponsored a competing amendment, likewise hammered the central theme of the debate: whether Congress should impose spending conditions on **the federal share** of the tobacco settlement:

> I don't want to tell the States what to do with their money, but when the Federal taxpayers provide over 50 percent of Medicaid monies to the States and we are paying 50 billion bucks a year in health-related

> costs and much of that through Medicaid, then I think **we have a right and an obligation to say that some portion of that money that is Federal money** ought to go for health-related purposes.

145 Cong. Rec. S2886 (March 18, 1999) (statement of Sen. Harkin).

The ultimately enacted appropriations rider merely confirmed who won that debate: States would not be told by Washington how to spend **the federal share** of the tobacco settlement, despite the federal government's acknowledged claim to a substantial percentage of the states' Medicaid recovery. Instead, States could use that money—that is, the **federal share** specifically under consideration—"for any expenditures determined appropriate by the State." 42 U.S.C. § 1396b(d)(3)(B)(ii).

Most telling, the Conference Report concerning the appropriations rider expressly declares the subject of the enactment to be "**the Federal share of funds** recovered under [tobacco] settlements or judgments." Conference Report on 1999 Emergency Supplemental Appropriations Act, 145 Cong. Rec. H3175, 3200 (emphasis added).[6]

Senator Hutchison herself, the rider's chief sponsor, stated that the federal government planned to "seize $18.9 billion of the State tobacco settlement funds **for Medicaid recoupment**." 145 Cong. Rec. S1145, 1157 (emphasis added). Similarly, in introducing the rider, Senator Gorton from Washington (a co-sponsor) described it thus: "I join

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[6] *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'") (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

my Senate colleagues in introducing this legislation to prohibit **the federal government from trying to recoup any funds** from state governments recovered from tobacco companies as part of their tobacco settlement **or from determining how these funds should be spent."** *Id.* at 1159 (emphasis added). Senator Leahy from Vermont (a co-sponsor) similarly described the rider as "legislation to prohibit the **Federal government from recouping** any part of the [tobacco] settlement"). *Id.* at 1161 (emphasis added). Senator Levin from Michigan (another co-sponsor) stated: "I will support an amendment to this bill which will keep in the states any so called **'federal share' funds**"). 145 Cong. Rec. S2342 (emphasis added).

Additionally, every one of the letters submitted to Senator Hutchison by state and local entities in support of the rider makes clear that the purpose of the rider, and the sole motivation for the intensive lobbying effort behind the rider, was to prevent recoupment of **the federal share** of the tobacco settlement, and that no part of the debate pertained to the Medicaid recipients' share.[7]

What is "plain," upon examination of the rider's text in its context, as amply reinforced by the legislative history, is that Congress treated **the federal share** of the tobacco

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[7] *See, e.g.*, letter from National Governors Association ("A major priority for the nation's Governors during the 106th Congress is ensuring that state tobacco settlement funds are protected from unwarranted **seizure by the federal government**"); letter from National Association of Attorneys General (supporting the rider because it protects "the state tobacco settlements from **seizure by the federal government**"); letter from the National Association of Counties (referencing **"federal recoupment"** and **"the federal government's claim"**); letter from the National League of Cities (supporting the rider because it "would prevent the **federal government** from taking a portion of state tobacco revenues"). 145 Cong. Rec. S1145, 1157-58.

settlement—nothing more, nothing less. The total silence of Congress with respect to § 1396k(b) and Medicaid recipients simply cannot yield a conclusion that Congress nevertheless stripped their substantive and vested rights in a sentence clearly rooted in the rights of the federal government vis-à-vis the states. As once observed by Chief Justice Rehnquist and appropriate here, "[i]n a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) (internal quotations omitted) (quoted in *St. Cyr*, 533 U.S. at 320 n.44. Only judicial usurpation of a legislative function would now read § 1396k(b) out of the law by stealth.

C. Congress' 1999 Rider Could Not Have Properly Repealed Section 1396k(b) by Implication—Which Applies With Even Greater Force in an Appropriations Measure.

Whether reasonable minds may differ as to the meaning of the statutory text at issue, three observations about the 1999 appropriations rider are indisputable: (1) neither its text nor the legislative history ever mentions section 1396k or Medicaid recipients, much less discloses express intent to repeal that independent law or affect the rights of Medicaid recipients in any way; (2) the 1999 rider was an *appropriations* measure, to which specific rules and limitations apply in the task of interpretation; and (3) Petitioner's interpretation of the 1999 appropriations rider, as amply supported by textual cues and legislative history, is *at least* a plausible interpretation that harmonizes all relevant parts of federal Medicaid law. Taken together, these propositions yield a single conclusion consistent with

controlling precedent: Congress did not strip Medicaid recipients of their section 1396k rights.

"[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest." *Rodriguez v. United States*, 480 U.S. 522, 524 (1987)) (citations and internal quotation marks omitted). "In the absence of some affirmative showing of intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *accord United States v. Boffa*, 688 F.2d 919, 932 (3d Cir. 1982). There is clearly no "positive repugnancy between the provisions" of section 1396k(b) and section 1396b(d)(3), as would be required for a finding of a legislative intent to repeal Section 1396k. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).[8]

Section 1396b(d)(3) and section 1396k(b) *can* be read in harmony, and therefore *must* be read in harmony. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) ("[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). Section 1396b(d)(3) prohibits the reduction of future federal Medicaid payments to states based upon tobacco settlement proceeds, and then (a) imposes no specific restrictions on the states' ability to spend that *federal* portion of the settlement, and (b) imposes no specific restrictions on the states' ability

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[8] Technically, the Tenth, Second, and First Circuit constructions of the 1999 amendment constitute a "partial" implied repeal of section 1396k(b), as only rights with respect to the tobacco settlement are purportedly affected. The difference is irrelevant. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974) ("A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled.").

to spend *their legal portion* of the settlement amount. Section 1396k(b) provides that any portion of the settlement amount that exceeds the state and federal government's Medicaid costs, and that is therefore neither the "federal" portion nor the states' "legal portion" of the settlement amount, shall go to the injured Medicaid recipients.

Any decision interpreting Congress' 1999 appropriations rider as anything other than a waiver of the federal government's share of the tobacco settlement proceeds creates a new and unprecedented principle of interpreting, and erasing, legislative enactments, and arrogates to the judiciary a function assigned to Congress by the most fundamental principles of our federalist form of government. *See Rotec Industries, Inc. v. Mitsubishi Corp.*, 215 F.3d 1246, 1258 (Fed. Cir. 2000).

The Second Circuit took artificial refuge in one canon of statutory construction—and misapplied it—in holding that the 1999 appropriations rider constitutes a "specific" statute that governs the "general" statute in section 1396k(b). See App. at 16a-17a. But, again, "specific" versus "general" is irrelevant where two statutes can be construed harmoniously. *See, e.g., Tyler v. United States*, 929 F.2d 451, 456 (9th Cir. 1991) ("Faced with an apparent conflict between an earlier specific statute and a later general statute, the commission took the appropriate step of harmonizing the two."). The Second Circuit simply ignored the cardinal canon of construction—especially in the context of implied repeals: if two statutes *can* be reconciled, they *must* be reconciled. *Monsanto Co.*, 467 U.S. at 1018.

Moreover, there is not, in fact, any applicable "specific over general" statute here. In its 1999 amendment, Congress addressed one aspect of the tobacco settlement. Congress was obviously *not* "specific"—quite the opposite—about the rights of Medicaid recipients. The only statute "specifically"

addressing the rights of Medicaid recipients is § 1396k(b). The "specific over general" proposition might have applied *if* Congress had "specifically" amended § 1396k(b) and made it clear that the tobacco settlement was to be exempted from 1396k(b)'s mandate. In that event, regardless whether Congress had mentioned Medicaid recipients (though it would have been peculiar not to), its more specific *later* treatment **of § 1396k(b)** would have governed that statute's general mandate.

To the rigorous presumption against implied repeal, this Court has added an even more forceful condemnation of implied repeals in **appropriations** measures. *See especially TVA*, 437 U.S. at 190 (doctrine disfavoring repeals by implication applies "with even *greater* force when the claimed repeal rests solely on an Appropriations Act"). In *TVA v. Hill*, this Court emphasized the significant practical danger of reading too much about substantive law into appropriations measures, upon which Congress itself has fastened strict limitations on scope. Id. at 190-191 (citing House Rule XXI(2) and Standing Rules of the Senate 16.4)

One authority described the critical federalist underpinning of this principle as follows:

> A doctrine that valuably distinguishes the judicial and legislative roles is the principle that federal courts do not assume that Congress uses one statute to implicitly repeal an earlier one. ... Repeal in an appropriations statute, in particular, is an acceptable conclusion only if Congress expressly relates the appropriations proviso to a previous law. The appropriations language must leave no doubt about legislative intent, like stating that no funds may be available to implement a previously authorized purpose, "notwithstanding" stated portions of the law identified in the appropriations bill.

L. Fisher, Statutory Construction: Keeping a Respectful Eye on Congress, 53 SMU L. Rev. 49, 61 (Winter 2000) (citing *United States v. Dickerson*, 310 U.S. 554, 555 (1940)); *accord Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992). Nothing in the 1999 appropriations rider even remotely satisfies these conditions for implied repeal in an appropriations measure.

Any determination that Congress' rider to the 1999 Emergency Supplemental Appropriations Act somehow repealed the disbursement requirements contained in section 1396k(b) would (1) erroneously disregard the rigorous presumption against repeals by implication, *and then* (2) erroneously assume "that Congress meant to repeal *pro tanto* § [1396k(b)] of the [Medicaid] Act by means of a procedure expressly prohibited under the rules of Congress," *TVA*, 437 U.S. at 191, *and then* (3) erroneously insist that Congress did this remarkable deed without ever even mentioning § 1396k(b) or the rights embodied therein.

The Second Circuit panel declined even to address the issue of limitations on the scope of appropriations measures. And this case, perhaps even more than *TVA v. Hill*—with which the Second Circuit opinion irreconcilably conflicts—demands application of the principle that appropriations measures cannot repeal substantive law located fifty pages away in the United States Code without any hint of intention to do so.

D. Interpreting Congress' 1999 Appropriations Rider to Destroy Medicaid Recipients' Vested Remainder Rights Poses Serious Constitutional Problems and Must Therefore Be Avoided.

Under the law that existed when the MSA was executed (and, Petitioner contends, still exists), Petitioner and others similarly situated acquired a § 1396k(b) right to the remainder of the state's Medicaid recovery. Thereafter,

Congress enacted § 1396b(d)(3). According to the Second Circuit, Petitioner thereupon lost that extraordinarily valuable property right—though Congress never mentioned any intent to affect Medicaid recipients at all, much less extinguish their entitlement to future proceeds of an executed settlement.[9] Such a result impermissibly operates retroactively *and* works an unconstitutional taking—infirmities easily avoided by doing what this Court commands in the first instance: harmonizing two statutes where that is fairly possible.

"A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321 (internal quotations omitted). Assuming only *arguendo* that Congress had the power even *expressly* to repeal the disbursement provisions of § 1396k for purposes of the tobacco settlement,[10] it did no such thing.

"[T]he first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively." *Id.* at 316 (citing *Martin v. Hadix*, 527 U.S. 343 (1999)). The most rudimentary

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9 There can be no dispute that the § 1396k(b) remainder interest is a protected property interest. Among other indicia, state law routinely recognizes the competing property interests in recoveries by Medicaid recipients. *See, e.g., Roberts v. Total Health Care*, 349 Md. 499, 513, 709 A.2d 142, 148 (1998) ("To the extent the settlement proceeds were intended to compensate for medical care they were not the property of the [Medicaid] recipients."). Here, Congress adds its express imprimatur through § 1396k(b).

10 For purposes of assessing the constitutionality of confiscating Petitioner's § 1396k(b) remainder interest, it is irrelevant that the precise amount due cannot yet be quantified. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980).

threshold for such "clarity" would require, at a minimum, express identification of (a) the specific right to be stripped; and (b) the class of people whose substantive rights are to be stripped. Congress identified neither. Indeed, this Court has observed that cases where it "has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *Id.* at 316-17 (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)).

Moreover, as this Court recently emphasized, statutes must be interpreted to avoid *not* merely unconstitutional results, but "difficult constitutional questions." *Id.* at 300 & n.13. Where, as clearly here, "an alternative interpretation of the statute" that avoids any constitutional thicket is "fairly possible," courts "are obligated to construe the statute to avoid such problems." *Id.* at 300. The threshold constitutional proposition—that § 1396k(b) confers on Plaintiffs a vested property interest that § 1396b(d)(3) would extinguish by stealth according to some circuits—raises a sufficient constitutional problem to opt against reading § 1396b(d)(3)(ii) in a vacuum. And, more to the point, no such reading and no such interpretive entanglement is necessary, as the alternative construction pressed herein is more than "fairly possible."

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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